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By Mr. Kirlin for Petitioner

SUPREME COURT OF THE UNITED STATES

October Term, 1900

Filed March 8, 1901.

Turret Steam Shipping Company, Limited, Claimant of the Steamship Barnstable,
Appellant-Petitioner

against

E. G. Hall et al., Owners of the Gas Schooner Fortuna, Lebaniah Arthur W. Nunatt, Petitioner; Harold Sherman et al., Administrators, &c., Petitioners; Isaac B. Stewart, Administrator, Petitioner
Appellees

and

against

The Boston Fruit Company, Charterer of the Barnstable, Respondent
Appellee

No. 178

BRIEF FOR THE BARNSTABLE

Convers & Kirlin
Proctors for Turret Steam Shipping Co., Ltd., Petitioner-Appellant

J. Parton Kirlin
Advocate

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Supreme Court of the United States,

OCTOBER TERM, 1900.

TURRET STEAM SHIPPING COMPANY, LIMITED, claimant of the Steamship "BARNSTABLE,"
Appellant-Petitioner,

AGAINST

A. G. HALL *et al.*, owners of the late Schooner "FORTUNA," Libelants; ARTHUR W. NUNAN, Petitioner; HAROLD EMERNAN *et al.*, Administrators, &c., Petitioners; ISAAC B. STEWART, Administrator, Petitioner,
Appellees,

and

AGAINST

THE BOSTON FRUIT COMPANY, Charterer of the Steamship "BARNSTABLE," Respondent,
Appellee.

No. 178.

BRIEF FOR THE TURRET STEAM SHIPPING COMPANY, LTD., PETITIONER.

STATEMENT.

This case comes up by writ of *certorari* issued by this Court to review a decree in admiralty of the Circuit Court of Appeals for the First Circuit, entered May 11, 1899, which affirmed a decree of the

District Court of the United States for the District of Massachusetts (p. 105).

The decree of the District Court awarded to the libelants the sum of $20,867.46, their damages caused by a collision between the schooner *Fortuna* and the defendant steamship *Barnstable*, and dismissed the petition of The Turret Steam Shipping Company, owner of the *Barnstable*, against the Boston Fruit Company, the charterer of the steamship, which prayed that the charterer should be brought into the case as a party respondent, and should be adjudged to pay the damages, if any, because the negligence that caused the collision was that of the charterer's servants (p. 86).

The material steps in the courts below were as follows:

On January 15, 1896, the first libel was filed by A. G. Hall and others, owners of the schooner *Fortuna* against the steamship *Barnstable*, to recover damages for the loss of the schooner in a collision with the steamer, off Cape Cod, on January 13, 1896 (p. 2).

The steamer being within the jurisdiction, process of attachment was waived, and a claim to the vessel was filed by the master, E. E. Paine, on January 15th (p. 4). On January 16th, said Paine, Frank E. Peabody and Robert Winsor bound themselves in the sum of $25,000 to the libelants, that Paine should abide by and pay the amount of the final decree of the Court or of any appellate Court (p. 5.)

On February 20, 1896, Arthur W. Nunan, a seaman on the *Fortuna*, filed a petition to intervene as co-libelant, against the *Barnstable* (p. 6).

On April 18, 1896, an order was entered, substituting the Turret Steam Shipping Company, Limited, owner of the *Barnstable*, in place of E. E. Paine, as claimant (p. 9).

On the same day and before the time to answer had expired, the Turrent Steam Shipping Company,

Limited, as owner and claimant of the *Barnstable*, presented a petition to the Court, showing that certain libels had been filed against the steamer in consequence of the collision; that it had been compelled to furnish a stipulation for value in the sum of $24,800, and a stipulation for costs in the sum of $200; that the *Barnstable* was let out at the time of the collision by a charter of demise to the Boston Fruit Company; and that the charterer supplied its own officers and crew, who were navigating the vessel at the time of the collision, without the intervention of any local pilot. It further alleged that the faults, if any, of those in charge of the *Barnstable* were, in legal effect, the faults of the said charterer, the Boston Fruit Company, and not of the said petitioner, the owner of the steamship. The petitioner accordingly asked for process to bring the Boston Fruit Company into the case, as a party respondent under the fifty-ninth Admiralty rule, or in analogy with it, and prayed that, if fault should be found on the part of those in charge of the *Barnstable*, the said Boston Fruit Company, as between it and the shipowner, should be condemned to pay the damages so caused. A copy of the charter-party referred to was annexed to the petition (pp. 14, 18).

Thereupon, on April 8, 1896, by order of the Judge, a summons was issued to the Boston Fruit Company to appear before the District Court, on a day stated, to answer the foregoing petition (*Record*, p. 18).

On the 6th of November, 1896, the Boston Fruit Company appeared and filed its answer, admitting that it was the charterer of the vessel, and that the charter-party annexed to the petition was a copy of the contract; but it denied that it was liable for the acts of negligence, if any, of the master, officers, engineers or crew of the steamship, and alleged that, under the charter-party, the Boston Fruit Company did not assume liability, or become liable for damage done by collision by the said steam-

ship, which alone, it averred, was liable therefor, in a proceeding *in rem* (pp. 25, 26 and 27).

The Boston Fruit Company did not answer the libel of A. G. Hall and others; but it answered the subsequent intervening petition of Harold Emernan *et al.*, in which the Boston Fruit Company was joined with the *Barnstable* as a party respondent (pp. 19, 28).

By the answers of the Turret Steam Shipping Company, Ltd., to all the libels, and by the answer of the Boston Fruit Company to the petition of Harold Emernan, issue was raised as to the fault of those in charge of the *Barnstable* in connection with the collision.

Subsequently, however, after the taking of certain testimony in the case, the counsel for the *Barnstable*, and for the Boston Fruit Company, became satisfied that those engaged in the navigation of the steamer were solely to blame for the collision.

They, accordingly, agreed with the libelants that the damages amounted to the sum of $19,475, with interest from January 1, 1897 (p. 35); and they agreed between themselves on a statement of the facts on which the liability for those damages, as between the owner and the charterer, should be determined (p. 37).

The material provisions of the charter-party (p. 14), which was drawn up on a printed form, and is partly in writing and partly in print, are as follows:

"1. The owners agree [to let], and the said charterers agree to hire the said steamship for the term of 36 calendar months (or in charterers' option until the completion of any voyage commenced at any time before, but not completed until after the expiry of the said 36 months) commencing on the 1st to the 15th day of March, 1894, she then being placed at the disposal of the charterers in their loading berth in the port of Port

Antonio, Ja., at such wharf or place (where she may always safely lie afloat) as the charterers may direct, she being then tight, staunch, strong, &c. * * *; to be employed in any lawful trades between North America and/or North and/or South America and/or West Indies (not north of River St. Lawrence, or south of the River Platte) in any order as the charterers or their agents shall direct, River St. Lawrence debarred between October 1st and May 1st.

"2. The charterers shall provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the captain, officers, engineers, firemen and crew who, excepting the guarantee engineer, shall be appointed by them. The owners shall appoint chief engineer for six months only, their (his) pay not to exceed that paid by the charterers in similar vessels. The owners shall maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches, with chain gear and donkey boiler.

"3. The charterers shall also provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, excepting for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Such repairs, as far as possible, and as is usual in such cases, to be done on board by the steamer's staff.

"4. The charterers shall pay for the use and hire of the said vessel at the rate of five hundred and fifty Pounds Br. Sterling (£550) each per calendar month, and at and after the same rate for any part of a month, the hire to continue from the time specified for terminating the charter until her delivery to the owner (unless lost) at the port of in the U. S. A. north of Hatteras. Payment whereof

shall be made in cash at New York semi-monthly in advance at the rate of $4.85 per Pound Br. Stlg. * * *

"5. That the cargoes shall be laden and/or discharged in any dock or at any wharf or place that charterers may direct where she can always safely lie afloat.

"6. That the whole reach, burthen and passenger accommodation of the ship, not being more than she can reasonably stow and carry, shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions and stores. Cargo and/or coals and/or cattle may be taken on deck at the charterers' risk so far as the same do not endanger the safety of the vessel.

"7. The expense of loading and discharging shall be borne by the charterers, the stowage shall be under the control of the master, and the charterers shall be responsible for the same. Ballast and dunnage as required shall be found by charterers. Sufficient cellular water ballast to be provided by owners as per plan.

"8. An inventory of plated ware, crockery, linen, and all other fittings, shall be taken at the commencement of this charter. Anything lost or broken, or afterwards repaired, to be replaced or provided by charterer, fair wear and tear excepted.

"9. The vessel shall be put into dry dock to have bottom cleaned and painted, if required by charterers at owner's expense every 6 months. Time so occupied shall not be paid for by charterers.

"10. The master shall be under the orders and directions of the charterers as regards employment, agency or other arrangements; and the charterers

hereby agree to indemnify the owners from all consequences or liabilities that may arise from the master's signing bills of lading by their orders, or those of their agents, or in otherwise complying with same. The master, although appointed by charterers, to be satisfactory to the owners.

"11. If the charterers shall have reason to be dissatisfied with the conduct of the chief engineer during first six months, the owners shall, on receiving particulars of the complaint, investigate the same, and, if called upon, make a change in the appointments when the steamer is in. Owners have same privilege as regards captain and officers and engineers during continuance of charter.

"16. That the owners shall have a lien upon all cargoes and all sub-freights for freight or charter money due under this charter, and also to have a lien on the ship for all moneys paid in advance and not earned.

"17. In the event of loss of time from collision, stranding, want of repairs, break down of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. Further, if in consequence of such deficiency, collision, want of repairs, break down or other causes, the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages and other expenses at those ports shall be borne by the owners; but should the vessel be driven into a port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers. It is understood, in the event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses, as the owners are by their insurance.

"22. That the owners shall pay for the insurance on the vessel.

"23. The benefit of all derelicts and salvages, as well as the loss of time and other expenses attendant thereon, to be for account of owners and charterers equally. * * *

"26. It is understood that charterers' captain joins at Middlesbro, and that the crew there shipped shall form the first complement" (pp. 14–17).

The *agreed statement of facts*, above referred to, was as follows:

"In the above entitled cause it is stipulated and agreed by and between the Turret Steam Shipping Company (Limited), claimant and owner of the steamship *Barnstable*, and the Boston Fruit Company, charterers, as follows:

"FIRST.—The collision alleged in the pleadings in the above entitled cause, was caused by the fault and neglect of those in charge of the navigation of the steamship *Barnstable* at the time, and was not caused or contributed to by the engineer of said steamship, nor by those in charge of the navigation of the libelants' schooner *Fortuna;* but this admission is made without prejudice to and without intent to waive any of the contentions of either of the parties hereto, regarding the liability of either as against the other, as set forth in the petition of said Turrett Steam Shipping Company (Limited), and the answer of said Boston Fruit Company thereto.

"SECOND.—The master, officers, engineers, firemen and crew of the *Barnstable* at the time of the collision, had been appointed by the Boston Fruit Company, and were paid by it under and pursuant to the charter-party referred to in said petition.

"THIRD.—The said steamship *Barnstable* had been engaged under the charter-party, a copy of which is attached to the said petition, for more than six months before said collision.

"FOURTH.—No complaint was ever made by either party under clause eleven of said charter-party.

"FIFTH.—There was no compulsory pilot on board said steamship at the time of the collision.

"SIXTH.—The collision was caused by the negligence of master, mates or crew at the time in charge of the navigation of the steamship.

"SEVENTH.—The master, mate, engineers, firemen and crew appointed as provided in said charter-party, were the only persons at the time in charge of the navigation of the said steamship, and responsible therefor.

"EIGHTH.—It is further agreed (subject to objection that the fact is immaterial, and the evidence incompetent), that the Boston Fruit Company had no insurance upon said steamship, and the petitioner, the then owner, carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured" (pp. 37, 38).

This stipulation, in effect, admitted that the libel must be taken *pro confesso*, and left for further consideration the single question of ultimate responsibility for the loss, as between the owner of the *Barnstable*, who was not guilty of any fault, and the Boston Fruit Company, whose servants, by their negligence, caused the collision.

Five classes of damage were claimed and recovered under the libel and intervening petitions: (1) for the loss of the schooner (pp. 2, 4, 86); (2) for the loss

of the schooner's fishing and other outfits (pp. 2, 4, 86); (3) for the loss of the personal effects of the master and crew (pp. 4, 86); (4) for personal injuries received by the intervening libelant Nunan, a member of the schooner's crew (pp. 6, 86); (5) for damages resulting from the death of eight members of the schooner's crew, claimed under the intervening petitions of Emernan *et al.* (pp. 19, 20, 21, 86), and Stewart (pp. 29, 30, 86), who recovered as administrators of the estates of the deceased (p. 86).

The charterer contended, in both the Courts below, that by certain clauses in the charter-party, including the provision "that the owners shall pay for the insurance on the vessel" (Clause 22) the "company did not assume liability or become liable for damage done by collision by said steamship, and that said steamship alone was liable therefor in a proceeding *in rem*" (pp. 26, 27).

There was no specific plea that the charterer was exempt, by virtue of the insurance clause, from liability for damage to another vessel caused through the negligence of its servants, or that the owners, under that clause, assumed the risk of such damage, or that the charterer was entitled to the benefit of such insurance as the owner had effected.

The shipowner contended:

(1.) That, *prima facie*, the damages should be borne and paid by the charterer whose faults caused the collision.

(2.) That the insurance clause (22) did not give to the charterer the benefit of insurances effected by the shipowner, but that its liability remained for losses arising from its negligence, whether the damage from such negligence was suffered by the *Barnstable* directly, or attached to her through the medium of a lien for injuries done to another vessel.

(3.) That if the charterer is right in contending that the effect of the clause was to leave with the shipowner the risk of whatever losses would be covered by an "insurance *on the vessel*," still the losses here in suit are not such as would be covered by an ordinary policy "*on the vessel*" *Barnstable.*

(4.) That even if the shipowner, by virtue of the insurance clause, should be deemed to have assumed the risks that would be covered by a special additional insurance against "running down" risks, one fourth of the schooners losses ($3,643, p. 36) would not be within such insurance as customarily made, and the damages awarded for personal injuries, and for death, $4,900 (p. 36), would not be within it, and that hence, in any event, those items of damage, aggregating $8,643, and interest, should be borne by the charterer.

The cause was heard in April, 1897, by the Honorable Arthur L. Brown, District Judge for Rhode Island, duly assigned to hold the District Court for the District of Massachusetts (p. 85), who delivered his decision January 25, 1898 (p. 90). In the final decree the opinion is referred to as "an interlocutory decree" (p. 86).

The District Judge found that the charter of the steamer to the Boston Fruit Company, operated as a demise of the ship (p. 91); that the collision was caused by the negligence of the charterer's servants (p. 91), and that unless there was some contract between the parties which provided to the contrary, the liability for the collision, as between the charterer and the owner, would have attached to the former (p. 93). He further found, however, that clause 22 of the charter-party, which provided "that the owners shall pay for the insurance on the vessel" (p. 16), was "a most unequivocal expression of an intention to assume, and to relieve the charterer, from all risks that would be covered by the insurance on the vessel for which the owner was to pay" (p. 93); "that the

phrase 'insurance on the vessel' was used with an actual intention to cover what, according to its literal terms, it was capable of covering, running down risks as well as risks of direct damage to the steamer; and that the Turret Steam Shipping Company, Ltd., assumed the risk, not only of damage to the vessel herself by collision or otherwise, but also undertook to be responsible for damage which the vessel, by the negligence of the charterers' servants, caused *to another ship*, including claims for personal injuries to, and for loss of life of, persons on such other vessel" (*Opinion*, pp. 93-98).

These conclusions led to the dismissal of the shipowner's petition against the charterer, and to the condemnation of the steamer for the damages claimed in the libel and in the intervening petitions (p. 86).

From the final decree so entered the Turret Steam Shipping Company, Limited, appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the decree in a short opinion by Judge Webb, based exclusively on the legal effect of the clause relating to insurance (pp. 103, 104).

It was assumed by the Court of Appeals, that the charterer would be bound to indemnify the shipowner against claims on the vessel, resulting from the collision, unless the contract of charter shifted the liability for such damage to the shipowner; but it was decided that the insurance clause did shift the liability, and had the effect of placing the risk of all insurable losses, however caused, on the shipowner. It was further held that all the losses here in question were such as, by the insurance clause, the shipowner undertook to assume, as between it and the charterer (p. 104).

The petitioner, The Turret Steam Shipping Company, Limited, thereon sued out this writ.

POINTS.

I.

The Court below correctly held that the damages arising from the collision were caused by the negligence of the charterer's servants, and that liability therefor must attach to the charterer, as between it and the shipowner, unless the terms of the charter-party devolve the liability on the shipowner.

1. It is immaterial to the point here presented for adjudication that the libel and the intervening petitions are against the *Barnstable in rem.*

The right of the libelants to decrees against the vessel has been assumed, by the courts below, under the general practice in this country to proceed, in collision causes, against the wrongdoing vessel directly, irrespective of her ownership, or of the agency of those in charge of her navigation (*The John G. Stevens*, 170 U. S., 113, 115–123).

Though perhaps not important in this case, it may be remarked that the maritime law, as administered in England, would not appear to justify a decree against the vessel *in rem* on the finding below that shipowners were not in control of the vessel, by their servants, at the time of the collision.

In the *Utopia*, 7 Asp. n. s., 408; [1893] App. Cas., 492, 499, Sir Francis Jeune, in delivering the judgment of the Privy Council, said:

"It was suggested in argument that, as the action against the Utopia is an action *in rem*, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law, now well recognized. No doubt at the time of action brought, a ship may be made liable in an action *in rem*, though its then owners are not, because, by

reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners, or their servants, at the time of the collision, and if that be not proved, no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of the collision may have possessed. In the recent case of *The Castlegate* ([1893] A. C. 52), in the House of Lords, language used by the present Master of the Rolls, in the case of *The Parlement Belge* (5 P. D., 197; 4 Asp. Mar. Law Cas., 234; 42 L. T. Rep., N. S., 273) which expresses the above view, was quoted with an approval, which their Lordships desire to repeat."

But, under the rule followed by the Courts below, it was competent for the Courts to determine the question of ultimate responsibility as between the vessel and the charterer. Though a lien for the collision damages attaches to the steamship, as the offending thing, the Court, having jurisdiction of both the charterer and shipowner, can adjust the rights, as between them, and place the loss on the one by whose fault it was occasioned (*Boyd* v. *Moses*, 7 Wall., 316, 320). It has been held in certain of the lower courts that in such cases the decree passes *in rem* against the vessel, with a provision that as between the owner and the charterer, the latter should pay the damages decreed, or if it failed to do so, that the owner have judgment against the charterer for the amount he may have to pay to the libelants.

The form of the proposed decree, as originally suggested by this petitioner, is quoted in the opinion of the District Judge (p. 91). It was in accordance with the practice adopted in numerous analogous cases (*The Centurion*, 57 Fed., 412, 415; *Salisbury* vs. *70,000 feet of lumber*, 68 Fed., 916; *Young*

vs. *Lehman*, 27 Fed., 383, 385; *The John Cottrell*, 34 Fed., 907; *Joice* v. *Canal Boats*, 32 Fed., 553; *The Alert*, 40 Fed., 836; *The City of Lincoln*, 25 Fed., 835; *Pierce* vs. *Winsor*, 2 Sprague, 35; cf. *In re New York and Porto Rico Steamship Co.*, 155 U. S., 523).

The English practice of bringing in third parties goes even further. It permits them to be cited in in common law cases, so that rights may be finally adjudged between all parties having common interests, which otherwise might have to be determined by further litigation. Sureties, guarantors, and all persons bound to indemnify defendants, are commonly cited in. (*Judicature Act* of 1873, § 23, Sub-div. 3; *Turner* v. *Hednesford Gas Co.*, 3 Exch. Div., 144, 151; *Benecke* v. *Frost*, 1 Q. B. D., 419, 421; *Ex parte Smith*, 2 Ch. Div., 51, 54; *Swansea Ship Co.* v. *Duncan*, 1 Q. B. D., 644, 648.)

Speaking of the analogous practice in equity, Mr. Justice Story (*Equity Pleading*, § 72) said:

"It is the constant aim of courts of equity to do complete justice, by deciding upon and *settling the rights of all persons interested in the subject matter of the suit*, so that the performance of the decree of the Court may be perfectly safe to those who are compelled to obey it, and also *that future litigation may be prevented* (*Milf. Eq. Pl. by Jeremy*, 163, 164; *Id.*, 39; *Cooper Eq. Pl.*, 33; *Caldwell* v. *Taggart*, 4 Peters R., 190; *West* v. *Randall*, 2 Mason R., 190 to 196; *Joy* v. *Wirtz*, 1 Wash Cir. R., 517; *Holland* v. *Prior*, 1 *Mylne & Keen*, 240). Hence, the common expression, that courts of equity delight to do justice and not by halves (*Knight* v. *Knight*, 3 P. Will., 333). And hence, also, it is a general rule in equity (subject to certain exceptions, which will be hereafter noticed) that *all persons materially interested*, either legally or beneficially, *in the subject matter of a suit are to be made parties* to

it, either as plaintiffs or as defendants, however numerous they may be, *so that there may be a complete decree, which shall bind them all* (*Mitf. Eq. Pl. by Jeremy*, 164; *Cooper Eq. Pl.*, 33, 34; *Id.*, 125; *Palk* v. *Clinton*, 12 Ves., 53, 54; *Hickok* v. *Scribner*, 3 John. Cas., 311, 315, 317, 318, 319; *Joy* v. *Wirtz*, 1 Wash. C. R., 517; *Caldwell* v. *Taggart*, 4 Peters R., 190; *Wendell* v. *Van Rennsselaer*, 1 Johns. Ch. R., 849). By this means the Court is enabled *to make a complete decree between the parties to prevent a future litigation* by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others, who are interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the Court the whole case may be seen; but it may not, where all conflicting interests are not brought out upon the pleadings by the original parties thereto (*West* v. *Randall*, 2 Mason R., 190, 191)."

This section is cited with approval in *Gregory* v. *Stetson*, 133 U. S., 579.

As the liability of the steamship, *in rem*, is not based on any presumption of fault on the part of the ship-*owner*, it is proposed now to inquire where the actual fault for the collision lay as between owner and charterer.

2. The real negligence that caused the collision was that of the charterer's servants.

a. The charter party operated as a demise of the ship, passing her management and control over from owner to charterer.

The material provisions of the charter are set forth in the preceding statement (Rec., pp. 14-17). The charterer agrees to "hire the said steamship." She is to be "placed at the disposal of the charterer";

"to be employed in any lawful trade, &c., in any order, as the charter shall direct." The charterer is to have exclusive possession of the whole ship (*clause* 6).

The charterer undertook to pay all the operating expenses of the vessel, including the *wages* of the captain, officers, engineers, firemen and crew, all whom it was to appoint (*clause* 2). The master, appointed by it, was under its direction as regards agency, employment and other arrangements, and it indemnifies the owner against the consequences of the master signing bills of lading, &c. (*clause* 10). It engaged to pay for all fuel, port charges and commissions; all expenses of loading and discharging, and "*all other charges whatsoever*," except (1) painting, (2) such repairs to the hull and machinery as cannot be done on board ship by the charterer's servants (*clause* 3), and (3) the insurance *on the vessel* (*clause* 22). All repairs that could be made on board the vessel were to be made by the charterer's staff (*clause* 3).

The charterer took the furniture of the vessel on an inventory (*clause* 8), agreeing to replace anything lost or broken, and to furnish anything further that might be required.

By clause 26, the first captain, who was to join the vessel at Middlesbro, was described as "*charterer's* captain."

By clause 2 the owners had the right to appoint the chief engineer for six months only. The purpose of this was to permit the builders of the engines to send a guaranty engineer to overlook them for the first six months of their use. This six months had expired prior to the collision (p. 37). At the time of the collision the entire force on board the vessel were appointees of the charterer (p. 37).

The owner was under no obligations by the charter, except (1) to furnish the vessel; (2), to make such necessary repairs to the hull and machinery as the charterer's servants were unable to make on board; and (3), to pay for the insurance on the ves-

sel. It did not undertake to send the ship on any voyages, or to carry any cargoes for the charterer.

It had no control over the ship, the master, the crew or the voyages. The charterer appointed, paid and controlled the officers, and determined the voyages and business of the ship.

Under the authorities, there is hardly room for a doubt that this charter-party effected a demise of the ship to the charterer (*Carver, Carriage by Sea;* 3d. Ed., §§ 113–117, *United States* v. *Shea*, 152 U. S., 178, 188, 189, 190; *Baumvoll Manufactur von Carl Scheibler* v. *Furness*, 7 Asp. Mar. Cas., 263; [1893], App. Cas., 8, 14, 15, 16, 17; *Clarke* v. *United States*, 95 U. S., 539; *Bramble* v. *Culmer*, 78 Fed., 497, 501, 503; *The India*, 21 Blatchf., 268, 269; *Meiklereid* v. *West*, 3 Asp. Mar. Cas., 129; 1 Q. B. Div., 428; *Reeve* v. *Davis*, 1 Ad. and El., 312; *Belcher* v. *Capper*, 4 M. and G. 502; *Newbery* v. *Colvin*, 7 Bing , 190; 1 Cl. and F., 286; *Sandeman* v. *Scurr*, L. R., 2 Q. B., 86, 96; *The Francis Wright*, 105 U.S., 381, 392; *Master of Trinity House* v. *Clark*, 4 M. and S., 288; *The Scout*, 1 Asp. Mar. Cas. (N. S.), 258; *The Alert*, 40 Fed., 836; *Gulzoni* v. *Tyler*, 64 Cal., 334; *Somes* v. *White*, 65 Me., 542; *Tucker* v. *Stimson*, 12 Gray, 487; *Webster* v. *Disharoon*, 64 Fed., 143.)

b. The conduct of the parties, in the execution of the contract, shows conclusively that it was a demise in its operation.

The conduct of the parties was considered material in *United States* v. *Shea*, 152 U. S., 178, 190, as showing the construction which they put on the contract in its execution. What was that conduct here? The charterer sent its own captain to Middlesbro to take the vessel from the builders' hands (*clause* 26). She had been a long time in the charterer's service, and had been manned and officered in accordance with the charter provisions. She was making a voyage for the charterer at the time of the collision.

The owner had never interfered even so far as to

make a complaint in respect to any of the officers, &c., under clause 11 of the charter (p. 37).

The ownership of the vessel had changed during the pendency of the charter, which had also been assigned; and the charterer had attorned to the new owner and had paid the agreed hire to it for a considerable time.

It is admitted that the collision was caused by the sole fault of the master, officers and crew of the vessel, who were appointed and paid by the charterer, under and pursuant to the provisions of the charter-party, and that they "*were the only persons at the time in charge of the navigation of said steamship and responsible therefor*" (*Stip.*, p. 37).

These conceded facts are equivalent to the finding in *United States* v. *Shea* (*supra* at p. 180), that the vessel was damaged in a collision "while in the service and under the exclusive management and control of the quartermaster's department," which the Court (p. 190) regarded as conclusive evidence of a transfer of "possession, management and control"—the very condition that it is the purpose and effect of a demise to accomplish.

c. From the fact that certain clauses in the printed form of the charter-party are not harmonious with the notion of a demise, the charterers, in the Court below, urged that the contract should be viewed as one of affreightment, and that the persons engaged in the navigation of the ship, though appointed by the charterer, should be deemed in law to be the agents of the shipowner.

The inaptness of some of the printed clauses arises from the fact, as has been explained by the witness Hall (p. 78), that when he devised the printed form some years ago he adopted many of the clauses from what is commonly called the "Government" form of charter-party (*Hall*, p. 78, *bundle of charter exhibits on file*, No. 1 and others).

It will be seen by a comparison of the *Barnstable's* charter with the Government forms contained in th

bundle, that clauses 3, 4, 6, 7, 10, 16 and 22 of the present charter-party are taken almost bodily from the Government form.

The fundamental difference between the Government form and the "net" form, as the *Barnstable's* charter is called, is that in the former the owners man and provision the vessel, while in the latter, she is manned and provisioned by the charterer (p. 52).

It happened in this way that some of the clauses in the form in suit, which would be apt in a government form, are inapt here; but as has been held in the cases presently to be referred to, such inaptness is by no means conclusive against a demise.

The provisions on which the charterer based the argument that the contract was not a demise are:

(1.) A slight limitation on the waters on which the ship may be employed (*Clause* 1).

(2.) The stipulation in regard to payment for the insurance on the vessel (*Clause* 22).

(3.) The terms with regard to repairs (*Clauses* 2 and 3).

(4.) The indemnity against the master's acts in signing bills of lading (*Clause* 10).

(5.) The stipulation for a lien, in favor of the owners, on cargoes and sub-freights for arrears of hire (*Clause* 16).

(6.) The stipulations in regard to furnishing the crew and paying for fuel, port charges, &c. (*Clauses* 2 and 3).

(7.) The provision that the master, although appointed by the charterers, is to be satisfactory to the owners (*Clause* 10).

The first five of these clauses were in the charter-party that was before the House of Lords in the case of *Baumvoll, &c.*, v. *Furness* [1893], App. Cas., 8, 15; the sixth was in the contract that was before this Court in *United States* v. *Shea*, 152 U. S., 178, 190, and the seventh was in the charter-party of the *Francis Wright*, 105 U. S., 381, 392.

In each of those cases it was contended that the presence in the contract of the clauses to which attention has been called was inconsistent with the notion that the parties intended a demise; but in every instance the contention was overruled.

Clauses of the charter could be referred to, which are inconsistent with the respondent's notion that it is a charter of affreightment. But this is unnecessary. Printed forms are designed for a variety of cases. If, in a particular case, the Court sees that certain clauses are inapt, they are disregarded (*Beddall* v. *British & F. Ins. Co.*, 143 N. Y., 94; *cases supra*). The operative words showing a transfer of the possession, command and control of the vessel, and the conduct of the parties in the execution of the contract, prevail over any mere inferences, based on unnecessary clauses which the parties have carelessly left in a printed form.

d. Whether the charter-party was a demise or not, it is manifest that the navigation of the steamer and the carrying of cargoes was the charterer's business (*The Turgot*, 11 P. D., 21, 24). The persons who were conducting that business were employed and paid by the charterer, and were performing functions which the charterer had undertaken to perform by his contract.

In the doing of the charterer's work, those who were engaged in the navigation of the ship at the time of the collision must be regarded as the charterer's servants and agents (*Young* v. *Lehman*, 27 Fed., 383, 385; and see *Boyd* v. *Moses*, 7 Wall., 316, 317, 320; *The Centurion*, 57 Fed., 412, 415).

3. The charterer, as the wrongdoer, is *prima facie* liable in these proceedings to the libelants and intervening co-libelants, as well as to the shipowner, for the whole amount of the damage to be awarded.

After a third party has been brought in under the 59th Admiralty Rule, the case proceeds as though such third party had been made a defendant originally (*Adm. Rule* 59).

The charterer was named as a defendant in the intervening petitions (pp. 19, 21, 29). An application was made to have the charterer joined as a respondent under the principal libel (pp. 21, 29).

Under Rule 59, the charterer should have answered the libel and the intervening petitions, as well as the petition of the Turret Steam Shipping Company, but, in fact, it answered only the petition of the Turret Steam Shipping Company (p. 25) and the intervening libel of Emernan and others (p. 28). The pleadings, though informal, suffice, however, to raise the material issues.

The case may be viewed in either of two aspects: first, as a claim by the injured libelants against the charterer to recover damages caused by the faults of their servants; or, secondly, as a claim by the owner, the bailor of the vessel, against his bailee, for indemnity for damage suffered by the owner through the medium of a lien on his vessel which was incurred by faults of the bailee.

a. Where a vessel is let out by a charter of demise, the charterer, or owner *pro hac vice*, as he is sometimes called, is liable for collision damages caused by the negligence of his servants (*Thorp* v. *Hammond*, 12 Wall., 408, 416, 417; *Cf. Williams* v. *Hayes*, 143, N. Y., 442). He is also liable on the contracts of the master.

The general owner is not liable, at law, in a personal action, for the *torts* of the charterer's servants (*Thorp* v. *Hammond* (*supra*), at pp. 416, 417; *Gulzoni* v. *Tyler*, 64 Cal., 334, 386; *Webster* v.

Disharoon, 64 Fed., 143; *Scott* v. *Scott*, 2 Stark., N. P., 438; 20 Rev. Rep., 438.

In *Gulzoni* v. *Tyler*, 64 California, 334, a claim was made for personal injuries sustained by the plaintiff while on board a vessel belonging to the defendants, but which, at the time of the accident, was chartered and was under the management and control of the charterer's servants. It was held that the owner of the vessel was not responsible for the damage. Sharpstein, *J.* (at p. 336), said:

"The rule, as stated in Shearman and Redfield on Negligence (§ 501) is that if the owner of property lets or lends it, and transfers the entire possession and control of it to another, the owner is not responsible for the wrongful use or mismanagement of it by the transferee. Whoever had the exclusive possession, management and control of the boat, its officers and men, was alone responsible for its mismanagement. And whether rightfully or wrongfully in such possession, the liability would rest on them alone. Under the rule *respondeat superior* this must be so. If the defendants were owners of the boat, but had not the possession, control or management of it themselves, or by their agents, servants or employees, they cannot be held responsible for the negligence or mismanagement of whoever had the exclusive possession, control and management of it."

It is also settled that the general owner is not liable on the master's contracts (*Tucker* v. *Stimson*, 12 Gray, 487; *Baumvoll*, &c. v. *Furness* [1893], App. Cas., 8); *Reave* v. *Davis*, 1 Ad. & El., 312; *Somes* v. *White*, 65 Maine, 312; *Thorne* v. *Hicks*, 7 Cowen, 696; *Wendover* v. *Hogeboon*, 7 Johnson, 307; *Leonard* v. *Huntington*, 15 Johnson, 298; *Sergeant* v. *Stark*, 12 New Hampshire, 332; *Fisk* v. *Manufacturing Co.*, 14 Pick., 491; 7 Amer. & Eng. Enc. of Law (2d ed.), pp. 194–196).

It is clear, under the above authorities, that the libelants and the intervening co-libelants are enti-

tled to judgment in these proceedings against the Boston Fruit Company.

b. The shipowner, if adjudged liable to pay the libelant's demands, is entitled to a decree over against the charterer for the amount.

If the steamship had been injured physically, instead of by the impairment of her title by the lien that arose from the collision, there would be no doubt that the charterer, unless absolved by some exception in the contract, would be liable for the damage.

In *Coupé Company* v. *Maddick* [1891], 2 Q. B., 413, the defendant hired a carriage and horse from the plaintiffs. The defendant's coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction, and while thus engaged, the carriage and horse were injured, owing to his negligent driving. It was held that there had been a breach of the defendant's contract as bailee, for which he was liable to the bailor.

CAVE, *J.*, in delivering the opinion of the Court (p. 414), said:

"The question raised in this case is whether a person who has hired a horse and carriage for a year is responsible to the owner of the horse and carriage for damage done to them by the negligent driving of the hirer's servant, where the servant, instead of taking the horse and carriage to his master's stable in the ordinary course of his duty, for his own purposes and to serve a friend takes the horse and carriage in a contrary direction, and they are injured in consequence of his negligent driving while thus engaged contrary to his duty. * * * (p. 415). When a wayfarer is injured by the negligence of a person who is driving a carriage along a highway, he has a right of action founded on tort against the driver, and, if the driver is a servant driving in the course of his employment, he has also

a remedy against the master on the principle of respondent superior; but where a man hires a horse and carriage, there is *an implied obligation on his part arising out of the contract to return them in the condition in which he received them*, fair wear and tear and certain accidents excepted; and, if they are injured by the negligence of the hirer's servant while driving in the course of his employment, the latter's remedy is by action on the contract, and can be enforced against the hirer only and not against his servant * * * (p. 417). Where one of two innocent parties has to suffer a loss arising from the misconduct of a third party, it is for the public advantage that the loss should fall in such a way as to diminish the probability of such a thing happening again, or, in other words, that it should fall on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. If, under these circumstances, the loss is to fall on the owner, who does not engage and cannot dismiss the servant, and who cannot recover over against him, the result is that it falls on one who could not have guarded beforehand against this accident, and who cannot prevent its recurrence, except by refusing to let out his horse and carriage in the future, which, so far from being a public benefit, is distinctly a public disadvantage, as tending to throw needless impediments in the way of business, and to render the letting and hiring of horses and carriages more expensive. If the loss is to fall on the hirer, it falls on one who will thereby be led to exercise greater care in the selection of his servant, who can punish the servant for his misconduct by dismissing him, and who, theoretically at all events, has a right of action against the servant.

"No case in point can be found on either side of the question; but, on the general considerations set out above, we are of opinion that the hirer is liable."

From the earliest times it has been held that damage to a hired vessel, caused by the bailee's negligence, must be made good to the bailor (*Cocks v. Bovyngton* (1551), 2 Select Pleas of the Court of Admiralty (by Marsden), 14; *Schultz and Markley's case*, 3 Mott & Hunt., (Ct. of Cl.), 56).

The bailee also answers for the total loss of the vessel, if caused by his fault (*Smith* v. *Bouker*, 40 Fed., 839; 49 Fed., 954; *Davey* v. *Chamberlain*, 4 Esp., 229; *Williams* v. *Hayes*, 143 N. Y., 442; *United States* v. *Yukers*, 60 Fed., 641).

The rule that requires the bailee to return the vessel free from damage caused by his fault, must also compel him to discharge all liens on her, and incumbrances on her title, for which he is responsible (*The Alert*, 40 Fed., 836; *The Centurion*, 57 Fed., 412; cf. *O'Brien* v. *Miller*, 168 U. S., 287, 304).

The relief to which the shipowner is entitled from the charterer, if it is adjudged liable, through the medium of a lien on the vessel, for the libelant's damages, may be granted in the same final decree that awards recovery to the libelants.

From the foregoing discussion, it is seen that the collision, and the damages which arose from it, were caused and occasioned by the charterer's faults; that the charterers are liable for such damages directly to the libelants, and indirectly to the shipowner, if the latter is compelled to pay the damages through the medium of a lien on the vessel; that the Court has jurisdiction of all the parties, can adjudicate the relative rights, and determine the ultimate responsibility for the collision losses, as between the different parties; and can adjudge that the charterer is liable in these proceedings for the whole loss.

It is proposed, now, to pass to a consideration of the question whether the terms of the charter-party devolve the losses, which *prima facie* should be the burden of the charterer, upon the shipowner.

II.

The Court below erred in the construction that it placed on clause 22 of the charter-party, which provides: "That the owners shall pay for the insurance on the vessel" (p. 16)

The effect attributed to that clause by the Court of Appeals, as expressed in the opinion of Webb, *J.*, was as follows:

"The insertion of this clause in the charter has no meaning unless it be to make such insurance as would profit the charterers, which could only be effected by insurance against losses which would fall upon them, against all risks attaching to them. This insurance clause must have been intended for their protection, and could have been understood by them in no other way, and the agreement of the owners was not to partially, but wholly to protect them, and to relieve them of the expense of insuring themselves. In effect, it said to the charterers,—Your only responsibility will be to pay the hire of the ship; all other things shall be our care and at our charge. If, having so agreed, they chose to take the hazard of loss and to save the cost of a policy, they made themselves insurers, and after the loss cannot throw it upon the charterers" (p. 104).

The petitioner maintains that this broad construction is not authorized by the language of the clause nor by any reasonable and proper interpretation of it.

Bearing in mind that claims before the Court amounting to $4,900 are for personal injuries to members of the crew of the *Fortuna*, and for the death of a number of such persons, none of which would be insurable under any known form of marine insurance (*McArthur, Marine Ins.*, 2 Ed.,

pp. 321, 324; Appendix III., pp. 372-378; 1 *Arnould, Mar. Ins.*, 3d Ed., 20, 21; 2 *do.*, 673; form of collision clause, 1 *do.*, 238, 239; *Taylor* v. *Dewar*, 5 B. & S., 58; *Gourlie*, p. 72); and that one-quarter of the remaining damages, for the loss of the schooner, outfits and effects, amounting to $3,643, is not insurable at all in some companies (*Gourlie*, p. 73), and customarily is not insured (3 *Joyce on Ins.*, § 2755; *Gourlie*, pp. 70-75), and, in the present case, was not insured (p. 38), it will be readily seen how extreme and farreaching the construction of this clause that was adopted by the courts below, really is. If the parties intended to make such an unusual engagement, it would have been more natural for them to have used words more clearly embodying their design, and to have avoided the use of a phrase—"insurance *on the vessel*"—which has a settled and judicially declared meaning that is too narrow for their purpose (1 *Arnould, Mar. Ins.*, 3d Ed., 20, 21; 2 *do.*, 673).

The petitioner's contentions, with reference to this clause, are:

1. That the insurance clause was not intended to require the owner to *provide* insurance, or in the alternative, to take the risk of damage which might be covered by it. It was introduced into the printed form on which this charter was drawn up merely to prevent the shipowner from claiming that the *cost* of insurance should be paid by the charterer, under clause 3 of the form, which provided (p. 14) that the charterer should pay not only certain stated expenses, in connection with the ship and her business, but also "*all other charges whatsoever* excepting for painting and repairs to hull and machinery and anything appertaining to keeping the ship in proper working order."

2. That the language of this clause cannot reasonably be extended so as to make the owner, whether

actually himself insured or not, an absolute insurer of the charterers, and to cut off the subrogation of the owners' underwriters on the vessel.

3. That, at the utmost, the clause should be interpreted as requiring the shipowner to provide an insurance *on the vessel* (*Barnstable*) only; it would not obligate him to insure against damage which the steamer might do to another vessel. The Courts below, apparently, have fallen into the error of following the Massachusetts doctrine holding that a policy "*on the vessel*" covers damages which the vessel insured may do to another vessel (*Nelson* vs. *Suffolk Ins. Co.*, 3 Cushing, 477), instead of the rule prevailing in this Court under which a policy "on the vessel" does not include damage which the insured ship may do to other vessels (*Insurance Co.* vs. *Sherwood*, 14 How., 351).

4. That if, in any view, the clause is susceptible of a construction that would require the owner to insure against damage which the ship insured might do to another ship, such additional insurance should be held to extend only to the usual three-quarters, in accordance with the customary rule for the insurance of such risks.

5. That on the most extended construction, of which the clause is capable, it would not obligate the owner to insure against the claims for personal injuries to persons on board another vessel, or against claims for the death of such persons.

III.

It was not the purpose of the insurance clause to require the owner to provide insurance for the charterer's benefit.

1. The introduction of the insurance clause, in the printed forms of charter-parties that are in

common use, appears to have been intended originally for the purpose of specifying which of the parties should bear the expense, if any, of insurance.

The insurance clause was not specially introduced in the charter party of this steamer for the purpose of embodying any previous agreement on the subject. On the contrary, it was a part of the printed form on which the contract was drawn up. The clause had existed, in a different sequence, in another kind of time charter for many years (*Bennett*, p. 62, x-Q. 214).

The printed form that was used by Hurlbut & Co., the brokers who negotiated the charter, had been drawn up by the witness Hall, a member of that firm, about 1886 or 1887, and had been used by them ever since. It was based originally on a copy of the time charter form of Lamport & Holt (who for many years operated a line of chartered steamers between New York and ports in South America), and on the foreign charters of three steamships named *Scythian*, *Pirate* and *Kenelworth*, whose business was in the hands of Hurlbut & Co., but whose charters had evidently been made abroad (*Hall*, p. 78).

The common form of time charter is what is called the "Government" or "Admiralty form." Under this form the owner mans and provisions the ship, during the period of the charter (*Bundle of charter-party forms*, Ex. 1).

It is evident, from a comparison of Hurlbut's form (p. 14) with the Government form of time charter (*Petitioner's Exhibit* 1 *in the bundle of charter-parties*), and with all the common forms based on it (*Petitioner's Exhibits* 2 *to* 20), that Mr. Hall carried into his *net* form, many of the provisions of the standard Government form, which were better adapted to that form than to his own.

The insurance clause was one of those that he took in the same words, from the Government form, but for some reason not explained, he put it in a different sequence (*Barber*, p. 83).

The petitioner produced to the Court all the standard forms of charter-party that its counsel could find in New York, and three prominent English forms, all which, with a single exception, contains the insurance clause, in the same form as in the *Barnstable's* charter.

It is in the same words in the Government form, where the owner provides the crew, as in the net form, where the charterer provides it. Presumably, therefore, it is introduced for the same purpose in both, though the liabilities of owner and charterer are quite different, under the different forms. In some instances it is provided that the insurance shall be paid for *by the charterer* (*Latson* v. *Sturm*, 2 Benedict, 328), though the provision that this charge shall be paid by the owner is more common (*The Francis Wright*, 105 U. S., 381-2; *Baumvoll, etc.* v. *Furness* [1893], App. Cas., 8, 15).

Those who are acquainted with the business of operating chartered vessels, know that certain usual charges will have to be borne by one or both the parties to a contract for the hire of a ship under a time charter. Hence, there are found in all such contracts an enumeration of the expected charges to be borne by each and a general clause providing that one of the parties shall pay all further charges that are not specified to be paid by the other. The more common form of this division of expenses is as follows:

"(1.) That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen and crew; *shall pay for the insurance on the vessel;* also for all engine room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service.

"(2.) That the charterers shall provide and pay for all the coals, fuel, water for boilers, port charges, pilotages, light and dock dues, dunnage, stevedoring, agencies, commissions, foreign consulages, expenses

on the cargo they may put on board, and *all other charges whatsoever*, except those before stated" (*vide Petitioner's Charter Exhibits* 1 *to* 19).

In the form of charter-party here in suit, these provisions appear in substantially similar form, except as regards wages and provisions, but in a different sequence:

"2. The charterers shall provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the Captain, officers, engineers, firemen and crew, who, excepting the guarantee engineer, shall be appointed by them. The owners shall appoint chief engineer for six months only; his pay not to exceed that paid by the charterers in similar vessels.

"The owners shall maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches, with chain gear and donkey boiler.

"22. That the owners shall pay for the insurance on the vessel.

"3. The charterers shall also provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions and *all other charges whatsoever*, excepting for painting and repairs to hull and machinery and anything appertaining to keeping the ship in proper working order. Such repairs, as far as possible and is usual in such cases, to be done on board by the steamer's staff" (*Rec.*, pp. 14-17).

If clause 22 be moved back to its original sequence, the provisions in this charter would follow the common scheme of dividing the charges between the charterer and owner, and of providing that the charterer "shall *pay all other charges whatsoever*," &c. It is fair to assume, therefore, that the clause

was introduced for the same purpose in both kinds of charters.

The evidence of the witnesses leaves little doubt as to what that purpose was. It is shown that insurance on hulls, in some amount, is a general custom (pp. 69, 79); and, of course, there is a charge for it. If it was not provided that this charge should be borne by one or the other, specifically, the party who was bound to pay all unspecified charges —"all other charges whatsoever"—might be called on to pay an insurance charge.

This explanation of the origin of the clause is givenby a number of competent and experienced witnesses, who are practically uncontradicted.

Herbert Barber, a witness of thirty-five years' experience, produced his own form of charter-party (Petitioner's Exhibit 7), and testified as follows:

"Q. 4 (Witness is shown charter-parties, Petitioner's Ex. 7). Is that your form of time charter? A. That is one of our forms of time charter; yes.

Q. 5. I notice in the clause No. 1 in that form, a provision that the owners shall pay for the insurance of the vessel.

Q. 6. Is that the usual form that is in all time charters? A. That is the usual clause.

Q. 7. And the form of it? A. Yes.

Q. 8. Do you know Hurlbut & Co.? A. I used to know them.

Q. 9. Look at clause 22 in their form and say whether that is the same clause and in the same form? A. It is the same clause, but not in the same sequence.

Q. 10. Not in the same sequence? A. No.

Q. 11. But the same in words, is it not? A. Yes, same exact words.

Q. 12. How does that clause come to be in time charters? A. You know in most time charters there is a clause about what each shall pay for. The owner shall pay for the provisions, wages, fees of the captain,

officers and crew; and then the next clause is the charterer shall provide and pay for all the coals, port charges, pilotages, commissions, consulate fees, except those pertaining to the captain, officers and crew, *and all other charges whatsoever;* and for that reason, under clause 1, they provide that the insurance of the vessel is to be paid by the owners.

Q. 13. That being a usual charge on all vessels? A. Insurance is a usual charge; yes" (pp. 83, 84).

Ramon G. Cadiz, a witness of twenty-one years' experience, who has charge of the time chartering department of Funch, Edye & Co., a large New York firm, produced the Government form of time charter in use by his firm (p. 75; *Petitioner's Exhibit Charter-Party No.* 19). He testified:

"Q. 6. (Paper shown witness.) Is this a copy of the time charter of your firm? A. Yes. That is our regular Government form of time charter (*paper put in and marked Barnstable Ex.* 19).

Q. 7. I notice in that charter-party a provision in the first numbered paragraph reading, 'The owner shall pay for the insurance of the vessel.' Is that a usual clause in all time charters? A. Yes.

Q. 8. How does that clause come to be there? A. It is one of the clauses introduced for the purpose of establishing that the owner must pay the insurance on the vessel.

Q. 9. What is the occasion for enumerating that as a charge against the owner? A. Well, if it was not there, the charterer might, under paragraph No. 2 be called upon to pay the insurance on the vessel, on the strength of the clause stating that all other charges whatsoever except those before stated are to be for account of the charterers" (p. 76).

Bennett, a witness for the charterer, clearly admits over and over again that this was the real purpose of the clause.

"The intention is clearly that *if* the *owner* insures

the vessel *he must pay* for the insurance, not the charterer" (p. 48).

The witness meant to aid the charterer, so far as he could, by expressing his own opinion, which was not, however, based on any settled practice, or on experience in the adjustment of claims, that the owner's insurance was intended to inure to the charterer's benefit. But, even with that intention, it is manifest, from the whole of his evidence, that he understood that the purpose of the clause was to specify clearly the party who was to bear the insurance charge, rather than to provide who should benefit by it (pp. 44, 46, 47, 48, 50, 55, 56).

The fact that the insurance clause, in identical form, is found in the types of time charter, under which the shipowner furnishes the crew, materially weakens the arguments on which the District Judge reached his conclusion, as to its import, in the *Barnstable's* charter, where the crew was supplied by the charterer.

He argued that the risk that a collision by the negligence of the charterer's servants might result in damage to another vessel, would probably be in the contemplation of the parties at the execution of the charter; that they would be likely, therefore, to contract with reference to it; and that presumptively the insurance provision, as contained in clause 22, was designed to cover such a case (pp. 97, 98). How will this reasoning apply in cases where, as in the government form, the crew is supplied by the owner, yet the insurance clause is in the same form? In such cases the *owner's* servants being in command and possession of the ship, the charterer would have no interest in requiring the owner to insure the ship, as any loss or damage which might be caused or occasioned either to the ship herself, or to another, could only be through the fault of the shipowner's servants, and so could not possibly give rise to any claim for indemnity from the charterer. It is obvious, therefore, that in the government form the introduction of the clause must be for some other

purpose than that suggested by the District Judge in this case. What other purpose can be suggested, however, except that which is furnished by the witnesses, who say, that the charge for insurance is specified to be paid by the shipowner, in order to bar a claim on his part, that it should be paid by the charterer, under the general undertaking to pay all non-enumerated charges? As the clause was obviously imported into Hurlbut's form, from the govment form, it is difficult to argue that it has a meaning, here, which it could not possibly have had in the form from which it was taken.

The construction of the insurance clause for which the petitioner contends is further supported by the fact that it often appears in charter-parties, not as an affirmative statement that the owner *shall pay for* the insurance on the vessel, but negatively in the form of a proviso, that the charterer *shall not* pay for it. Thus, in *The Francis Wright*, 105 U. S., 381, 382, the charterer agreed "to man, coal and victual steamer, and pay all expenses of every nature, including port charges, &c., connected with running of the steamer, *except insurance on vessel* and repairs"; and in *The Scout*, 1 Asp. Mar. Law Cas., N. S., 258, the charterer agreed to pay "all expenses of the crew, fuel, oil, tallow, dues, repairs, and all other costs and charges incidental to the running of the steamer, *excepting only insurance.*" * * * In other instances (*e. g.*, *Latson* v. *Sturm*, 2 Ben., 327) it is specifically provided that the charterer shall pay this charge. But, unless there is a clearly expressed intention that the charterer shall have the benefit of the insurance there is no usage or practice that the charterer shall benefit in any way by the shipowner's insurance (*Bennett*, p. 50; *Cadiz*, p. 76; *Hall*, pp. 78, 79; *Barber*, p. 84).

The fact that the clause deals only with the *expense* of insurance, and *omits all reference to a duty*

to provide it, confirms the petitioner's argument as to its purpose.

Mr. Hall, the member of the firm of Hurlbut & Co., who composed the blank form on which this charter-party was made, states that it was not the intention of clause 22 to bind the owner *to provide* insurance (pp. 78, 79, 81, 82). He apparently introduced it simply because it was "a common phrase used in making time charters" (p. 81).

The charterer argues that the intent was to require the owner to *provide* insurance against the charterer's negligence, or to become an insurer itself, if no insurance was effected. But such an implication, plainly, should not be drawn if it is not the necessary, and only reasonably possible construction of the clause. Another equally reasonable interpretation of it would be that the charterer might desire to effect insurances "on the vessel" himself, and charge the cost to the owner. His insurable interest in the vessel is clear (1 *Arnoned on Ins.*, 3d Ed., 53). In this view of the clause, the charterer would have no right to invoke it here, because he had failed to provide the insurance, and had made no demand on the owner for the cost of it.

If inferences as to the intent of the clause are to be indulged in, the owner might say that as he had agreed to pay the cost of insurance, he should never be called on to bear any loss that could have been saved by insurance, which might have been provided by the charterer; and that, in this case, he could not fairly be charged with even the cost of a policy that would have covered the losses, because none was effected by the charterer, and no demand was ever made for the cost of insurance to cover the charterer's risks. The liability here is primarily a charterer's liability; the risk of it is *prima facie* the charterer's risk. So far as *providing* the insurance of such a risk is concerned, the inference that the charterer was bound to provide it, is much stronger than that the owner was to do so. Where it is a

question of devolving a liability from one who, under ordinary rules of law, is bound to bear it, to one who by the same rules is not subject to it, the contract which is claimed to have such an effect ought to be clear beyond all fair and reasonable doubt.

2. The District Judge erred in finding that it was "proved by the charterer, and is not disputed, that the actual *understanding of the owner* at the execution of the contract was that the phrase included insurance against risks of all kinds" (p. 96).

This finding is stated to have been predicated on the testimony of Bennett, the broker who negotiated the charter.

He testified: "I have had a good deal of experience in various insurance claims, so much so that I claim—* * * so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel in any way, shape and manner, against stranding, collisions and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure" (pp. 96, 44).

This statement of the witness was not responsive to any question addressed to him (p. 44), and was received by the Court over the objection to all testimony as to conversations prior to the signature of the charter "as immaterial, irrelevant and incompetent, and inadmissible to explain the writing" (p. 40). These objections were duly taken at the trial, and were noticed by the Court in the opinion (p. 96).

It was incompetent for Bennett to give parol contemporaneous evidence that the words, "insurance on the vessel," in the charter meant something different from what they said (*Seitz* v. *Brewers' Co.*, 141 U. S., 510). The evidence was received as explaining an uncertainty in words that were assumed to be susceptible of two constructions (p. 96). But they are not susceptible of two constructions (*Moran* v. *Mather*, 23 Wall., 492, 499, 500). They have but one legal meaning (*General Ins. Co.* v. *Sherwood*,

14 How., 351, 361, 367), and that meaning, as judicially determined, is at complete variance with the sense in which the witness Bennett says that he told the former owner that he (Bennett) understood them.

It is to be observed that Bennett does not state anything that the former owner *said to him*, from which a finding can be fairly made as to "the actual undestanding of the *owner*." On the contrary, it seems that he merely expressed *his* opinon *to* the owner, if, indeed, he did even that. It is not asserted that the owner coincided in this view; so that the evidence, if admissible, really does not prove any understanding except Bennett's.

Bennett's first statement of the conversation is worthy of notice (p. 42):

"Q. Did you have any conversation with Mr. "Craggs (the prior owner) in regard to that clause? "A. I did—several.

"Q. Please state the substance of that conversa-"tion? (Objection.)

"A. I told him that he would have to insure for "his vessel *the same as the charter-party stated*" (p. 42).

From this it would appear that he merely called the owner's attention to clause 22 as it stands.

But, whether Bennett's statement to Craggs was of the tenor first stated, or of that afterwards testi fied to, it is inconclusive, (1) because it made no reference to insuring against damage which might be done to other ships; (2) because it does not assume to say that Craggs coincided in Bennett's view, and therefore did not bind him to any *agreement dehors* the contract, and (3) because it was inadmissible as against the Turret Steam Shipping Company, the purchaser of the vessel and assignee of the charter-party, who was not proved to have had any notice of the conversation, and therefore, in making over the charter, was only bound by the obligations imported by the words of the clause in their ordinary

sense, or in the sense of some settled trade meaning (*Paige* v. *Cagwin*, 7 Hill, 361; *Bristol* v. *Dame*, 12 Wend., 142; *Clews* v. *Kerr*, 90 N. Y., 633; *Truax* v. *Slater*, 86 N. Y., 630; *Taylor* v. *Van Tassel*, 86 N. Y , 642).

The fact of the transfer of the ownership of the vessels and of the charter-parties from Craggs to the Turret Steam Shipping Company, and of the attornment of the Boston Fruit Company to the vendee, prior to the collision, are admitted in the respondent's answer to the petition (p. 26).

IV.

The language of clause 22 of the charter-party cannot reasonably be extended so as to make the owner, whether actually himself insured or not, an insurer against claims for damage to other vessels caused by the charterer's negligence.

It has been argued by the charterer, and decided in the Court below, that, by virtue of the insurance clause, the shipowner assumed the risk of all damage that might be caused to other vessels, or to those on board of them, by collision due to the charterer's faults. The finding of the Court of Appeals, in effect, makes the shipowner a guarantor of the solvency of the underwriters on the partial insurance that he effected for his own protection (p. 38), and of its collection; compels him to assume a considerable liability for losses for personal injuries and death, which are not insurable under a marine policy, and effectually cuts off the right of subrogation of the shipowner's underwriters against the wrongdoer who caused the damage.

In all three respects, it is submitted, the conclusion of the Court of Appeals was unwarranted.

If the clause stated that the owner was to provide, as well as to pay for, the insurance on the vessel, it would mean no more than that he was to insure in the customary way and to the customary extent. It would not mean that he assumed liability towards the charterer of whatever might be thus insured, nor would his underwriters on payment to him be debarred, by the clause, from suing the wrongdoer for the loss.

In *The Lord of the Isles* [1894], Prob., 342, the plaintiffs chartered a tug from the defendant under mutual covenants that the plaintiffs should indemnify the defendant against any loss, damage, expenses or costs to which the defendant might be put by reason of collision, salvage services, or otherwise, in connection with the tug, and the defendant agreed to insure the tug and keep it insured fully against all risks, including collision risks, and the risk of damage to or by craft or vessels in tow of the tug, or of such vessels or craft colliding with others; and in case any craft or vessel that the tug might be towing should be damaged by or should occasion damage to any craft or vessel, or other wise, which should be covered by the insurance, then the defendant would indemnify the plaintiffs in respect of all such damage to the extent of all moneys received by him under such insurance. The defendant effected insurance pursuant to these undertakings.

Subsequently, while the tug was swinging some barges which she had in tow above London Bridge, the tow rope broke, and the barge collided with and damaged another vessel. In an action by the owners of that vessel against the plaintiffs, they, as defendants in that action, admitted their liability, and certain damages were assessed against them, which they called on the defendant, in the case under discussion, to pay. The defendant presented the claim against their underwriters, but the latter denied their liability. The defendant then offered to turn

over the policies to the plaintiff, but the latter insisted that the defendant should sue the underwriters, or, alternatively, himself pay over the money pursuant to the agreement above stated. Plaintiffs then brought suit, but Bruce, *J.*, dismissed the complaint, holding that the defendant, in insuring, was merely the agent of the plaintiff, and did not guarantee either that the underwriters were solvent, or that they would pay the claims which might be presented against them. It was argued by the plaintiffs' counsel that the defendant, having undertaken to insure, was bound to pay the loss, and to look to insurance for his indemnity, but this contention was overruled.

In a number of English cases, the Courts have considered the effect of provisions in charter-parties relating to the payment of advanced freight "subject to insurance." *Carver, Carriage by Sea*, 3d Ed., § 566, deals with a number of such cases.

"Where a charter-party provides that freight shall be payable in advance 'subject to insurance,' this merely means subject to deduction of the cost of insurance. It throws no duty on the shipowner to insure the freight advanced for the benefit of the merchant (*Jackson* v. *Isaacson*, 27 L. J., Ex., 392; 3 H. & N., 405; *Watson* v. *Shankland*, L. R., 2 H. L., Sc. 304).

"The arrangement amounts to this, that the shipowner, in consideration of the convenience of having the freight advanced, is willing to bear the cost of insuring that advance. That cost is therefore allowed, or returned, to the merchant out of the advance when he makes it. And the shipowner thus, in effect, bears the risk (represented by the cost of insurance) of the freight not being earned (cf. per Charles, *J.*, *Smith* v. *Pyman* (1891), 1 Q. B., 42).

"In *Rodocanachi* vs. *Milburn* (17 Q. B. D., 316; 18 Q. B. D., 67; *cf. Hill* vs. *Scott* (1895), 2 Q. B., 371, 713), it was contended that as the shipowner, under this clause, bears the cost of insuring the ad-

vances, it has the effect of relieving him from responsibility for any kind of loss of the advances, or of the increased value in the goods which represents them. Charterers were there to make advances 'on account of freight at current exchange subject to insurance only.' They did so, and the cost of insurance was allowed to them. On the voyage the cargo was lost by the negligence of the master, and the question arose whether, in calculating the damages payable by the shipowner, deduction should be made from the arrived value of the cargo of the whole of the charter freight, or only of the freight which remained unpaid. Manisty, *J.*, held that the whole freight must be deducted, on the ground that the charterers had agreed, as to the sum advanced, 'not to look to the shipowners, but to their rights under their contract of insurance,' but his ruling was reversed by the Court of Appeal. And in *Dufourcet* v. *Bishop* (18 Q. B. D., 373; so also, *Great Indian Pen. Rail. Co.* vs. *Turnbull*, 53 L. T., 325) under similar circumstances, the cargo owner was allowed to recover the advanced freight, which he had insured, for the benefit of his underwriters."

In *Dufourcet* v. *Bishop*, 18 Q. B. D., 373, above referred to, goods were shipped on the defendants' ship under a charter-party, which provided that, if required, the whole freight should be advanced by the charterer subject to a deduction for interest and insurance. The freight was paid in advance, and the amount was insured by the charterers. The charterers sold the goods to the plaintiffs at a price covering cost, freight and insurance. The cargo was lost by the negligence of the defendants.

In an action for the loss of the goods, it was held that the plaintiffs were entitled to recover as part of the damages sustained by them, the amount of the advanced freight, which was included in the price paid by them for the goods; for the insurers of the freight, who had indemnified the plaintiffs, were

entitled to be subrogated to the rights of the plaintiffs in respect of the advanced freight, and to have the action maintained for their benefit for the amount insured, as it would, but for the insurance, have formed part of the damages to which the plaintiffs would have been entitled.

Denman, *J.*, in delivering judgment (p. 378), said:

"The defendants, the shipowners, further contended that no action would lie against them at the suit of the plaintiffs in respect of the £600 advanced freight because by the charter-party and bills of lading the plaintiffs and Gibbs & Co. were bound by the stipulation as to advanced freight, and the freight of £600 had been advanced accordingly, and the plaintiffs and Gibbs & Co. undertook to insure and look to the underwriters for any loss which could be covered by insurance, and that inasmuch as the plaintiffs could not recover back the £600 from the defendants on their own account (according to *De Silvale* v. *Kendall* (4 M. & S., 37) and other cases), neither could they sue for the benefit of the insurers in order to indemnify them against a risk for which they were liable under the policy, but for which the defendants, the shipowners, were not liable at all.

"I am of opinion that this defense merely amounts to an ingenious attempt to defeat the City of London Insurance Company of its right to be subrogated to the rights of the plaintiffs as against the defendants in respect of so much of the damages recoverable by the plaintiffs as they had covered by the policy of the £600, on which the company had been compelled to pay the plaintiffs that amount.

"I think it clear from the decision of the Court of Appeal in the very recent case of *Rodoconachi* v. *Milburn* (*Ante*, p. 67) that upon the loss of the vessel by the negligence of the defendants, the plaintiffs were entitled to damages, including the £600 for which they were liable to Gibbs & Co., as part of the value of the cargo, at the end of the voyage.

I think it equally clear that they had no right as against the insurers of that advanced freight to barter away their right to recover it as part of the damage sustained by them by the loss of the cargo."

Further (p. 379) the learned Judge said:

"It was admitted on the hearing that the insurance company had insisted on the action being continued for their benefit in respect of the £600 in question. I do not think that the cases cited by Mr. Barnes are at all inconsistent with this view. Though they establish as a general rule that money paid by way of advanced freight cannot be recovered back on the failure of the voyage, they by no means establish that where the cargo owner has, as part of the price of the goods, paid or become liable to pay a sum for freight in advance, and the goods are lost by negligence of the shipowner, he may not, as part of his damages (which are to be considered with reference to the value of the goods at the port of arrival), be allowed as against the shipowner an amount equal to the freight so advanced, and, if he happens to be partially indemnified against that loss by an insurance of that very amount of advanced freight, I can see no reason why the insurer of that amount should not be entitled to sue in his name for it as part of the damage which the cargo owner, but for the insurance, would have sustained by the defendant's negligence. I think for the above reasons that the plaintiffs are entitled to judgment for £600, and I give judgment accordingly for that amount, with costs."

In *Hill* v. *Scott* (1895), 2 Q. B., 371; on Appeal, 713, the plaintiff shipped certain goods on the defendant's steamer with instructions to the defendant to insure them. They were, in fact, insured by the defendant. It was claimed by the defendant that his arrangement with the plaintiff was that the goods should be carried without liability on the de-

fendant's part for negligence, and that the plaintiff agreed to look to the avails of insurance for any losses he might sustain.

In the Court of Appeal, Lord Esher, M. R., disposed of the point as follows:

"The effect of the defense raised by the defendant's solicitors is this—that it was agreed that the defendant, as agent for the plaintiff, should take out policies of insurance on the wool, and that the proper inference to be drawn from this, and from the course of business between the parties, is that the defendant was not to be liable for any loss covered by the policy of insurance. The Lord Chief Justice held that the insurance was made by the defendant on his own behalf; and, having looked at the reasons given for this conclusion, I agree entirely with them, and with the conclusion that no inference can be drawn of any stipulation to limit the defendant's liability. I also agree with the conclusion of the Lord Chief Justice, that had the insurance been effected by the defendant as agent that would not entitle the Court to draw the inference that the defendant's liability was to be limited. Even if the insurance had been effected on behalf of the plaintiff, it would give him an additional protection in case of loss, but he would not thereby lose his right to go against the defendant, and would be at liberty to sue either the defendant or the insurers."

A clause in carriage contracts, assuming to exclude liability for all insurable damage, does not release the carrier from damage due to negligence (*Carver, Car. by Sea*, 3d Ed., § 105; *The Hadji*, 20 Fed., 87).

In *Steele* v. *Buck*, 61 Ill., 343, a charter-party contained a clause that "the charterers should cause the vessel to be insured in the name of Buck (the owner) and that the charterers should pay 85% of

the premium," evidence was offered that there was such an insurance.

The Court, Scott, *J.*, page 35, said: "The mere fact that the vessel was insured for the benefit of the appellee would constitute no defense to the action." It was held that nothing short of proof of satisfaction of the loss would suffice, even under the form of the clause there involved.

The foregoing cases clearly show that, whatever may be the true office of the insurance clause, it does not make a person an insurer, merely because he has agreed to pay or bear the cost of an insurance.

All that appears with regard to the owner's insurance, in this case is that he "carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, * * * being in part uninsured" (p. 38). It may fairly be inferred from the other evidence in the case that there was no insurance of the fourth quarter running-down risk, or of the claims for the personal injury and death.

If it be assumed, for the purpose of the argument, that such was the case, what would be the result? The insurance would cover everything which, according to the custom of insurance, as testified by Mr. Gourlie on his cross-examination, it could possibly be expected that the owner would have insured (*Gourlie*, pp. 70-75.) It would amount to a compliance with the shipowner's obligation on the most extended interpretation of the insurance clause for which the charterer could contend. The pinch would come on the question whether the charterer was entitled to the benefit of this insurance to the extent of defeating the right of subrogation of the shipowner's underwriters, who, if called on to pay, would have a cause of action against the charterer as the wrongdoer who caused the loss.

The bare fact that there was insurance would be of no advantage to the charterer unless he was en-

titled to the benefit of it, as between him and the owner, to the extent of foreclosing and completely cutting off the underwriters' subrogation.

It is remarked that where the charterer desired a *benefit*, under the charter party, he stipulated for it explicitly. Thus, in clause 23, which immediately follows the insurance clause, it is provided that: "The *benefit* of all derelicts and salvages * * * to be for account of owners and charterers equally." Moreover, at the end of clause 17, there is a provision which plainly implies that the owner's insurance is for his own account alone, and further that the charterer is understood to have some insurance in its own name and for its own account.

It was not stipulated that the charterers should be named as the assured in the shipowner's policy, and hence, of course, they could claim nothing under it directly (*Carroll* v. *Boston Marine Ins. Co.*, 8 Mass., 515). The underwriters have a right to have the owners prosecute the claim in these proceedings as against the charterer, by virtue of their right of subrogation (*Dufourcet* v. *Bishop*, 18 Q. B. D., 373). This right, on the part of the underwriters, cannot be cut off except by the most explicit provision in the contract between the owner and the charterer (*Mobile Railway* v. *Jurey*, 111 U. S., 584, 594, 595; *Clark* v. *Wilson*, 103 Mass., 219, 227; *North of England Assn.* v. *Armstrong*, L. R., 5 Q. B., 244; cf. *Inman* v. *So. Car. Ry.*, 129 U. S., 128).

There is no stipulation in the charter-party which, in terms, or by necessary implication, provides that the charterer shall have the benefit of the insurance effected by the owner (for the forms of such stipulations see *Holmes* v. *Montauk Steamship Company*, 93 Fed. Rep., 731, 733; *Phenix Ins. Co.* v. *Erie Railway*, 117 U. S., 312), or assumes to abridge or abrogate the underwriters' right of subrogation.

It would be against public policy to presume that such was the intention of the insurance clause; for,

as was said by MR. JUSTICE CURTIS, in *General Ins. Co.* v. *Sherwood*, 14 How., 351, 367-368:

"We cannot doubt that the knowledge by owners, masters and seamen, that underwriters were responsible for all the damage done by collision with other vessels through their negligence, would tend to relax their vigilance and materially enhance the perils, both to life and property, arising from this case."

V.

Even if it be assumed that, under clause 22, the owner was bound to provide, as well as to "pay for the insurance on the vessel," and to give the charterer the benefit of it, the charterer could not ask for the benefit of any insurance except "on the vessel" (Barnstable), and such insurance could not be offset against the owner's claim, in this proceeding, because the losses here involved would not be included in such an insurance.

1. The "insurance *on the vessel*," for which the owner was to pay, would not include insurance against "running-down risks," but would include only insurance against damage to the vessel insured, unless the import of the clause can be extended by reference to some settled practical construction of merchants and underwriters, under which it would necessarily include something additional.

The phrase "insurance *on the vessel*" is a technical expression found in all policies on ships, and has been construed by the Courts.

The ancient form of insurance by Lloyds' policy on a ship was in these very words: "Be it known that A. B. * * *

"doth make assurance and cause himself * * * "to be insured * * * *upon the body*, tackle, "apparel, ordnance, munition, artillery, boat and "other furniture *of and in good ship or vessel* "called the * * *" (*Gow Marine Insurance*, p. 29; *McArthur, Mar. Ins.*, 2d Ed., *pp.* 27, 28; 1 *Arnould, Mar. Ins.*, 3d Ed., 220; *Gourlie, p.* 69; *Petitioner's Exhibits* 17, 18). Those exhibits show that at the present day hull insurance is made "*on the vessel.*"

In *General Mutual Insurance Company* v. *Sherwood*, 14 Howard, 351, an effort was made to recover under a policy issued "*upon the brig Emily*" (p. 361), a loss of $8,000 which her owner had been compelled to pay for damage done by the *Emily* to another vessel. It was held that an insurance "upon the brig *Emily*" *did not cover damages which the brig might do to another vessel*, but only damage which came to the *Emily* herself.

The English law is to the same effect (1 *Arnould, Mar. Ins.* 3d Ed., 20, 21; 2 *do.*, 672, 673).

In *Tyser on Marine Insurance Losses* (London, 1894), the rule is stated as follows:

"§ 129.—The only effects of the perils insured against, for which the underwriter *on ship* is liable, are damage or loss of the ship, &c., insured. * * * A mere money loss, not arising from damage to the ship insured, *e. g.*, a payment to be made to an other ship for injury done to it in collision, is not a loss recoverable from the underwriter, in the absence of a collision clause (*De Vaux* v. *Salvador*, 4 Ad. & El., 420)."

In the present case, therefore, under those authorities, an insurance by the owner of the *Barnstable* "on the vessel" in the language of clause 22, would not have indemnified him against any part of the damages adjudged to be paid in this cause to the *Fortuna* and her crew.

Must it not be assumed that when the parties have embodied in their contract a printed form of a clause that has a clearly defined legal meaning, they intended to use the clause in its proper legal signification?

Both the Courts below appear to have followed the Massachusetts decisions as to the scope of the phrase "an insurance on the vessel." Under the doctrine of the Massachusetts Courts such an insurance covers not only damage to the vessel insured, but also that which the insured vessel causes to another by collision (*Nelson* v. *Suffolk Ins. Co.*, 3 *Cushing*, 477). Though the Courts sat in the State of Massachusetts, they were, nevertheless, bound to follow the decision of this Court in *General Mutual Ins. Co.* v. *Sherwood* (*supra*), and they erred in failing to do so.

2. If it be admissible to receive parol evidence of the meaning of an "insurance on the vessel," the testimony in the record is overwhelming to the effect that the words have no trade meaning that is different or more extended than their ordinary sense, as judicially defined.

In *Insurance Company* v. *Sherwood*, 14 How., 351 (at p. 362), Mr. Justice Curtis said:

"In examining *for the first time* any question under a policy of insurance, it is necessary to ascertain whether the contract has received *a practical construction by merchants and underwriters; not through any partial or local usages, but by the general consent of the mercantile world.* Such a practical construction, when clearly apparent, is of great weight, not only because the parties to the policy may be presumed to have contracted in reference to it, but because such a practice is very high evidence of the general convenience and substantial equity of it as a rule."

The evidence of Bennett was introduced by the charterer for the purpose of establishing a practical construction, to the effect that clause 22 imposed an *obligation* on the owner to insure against running down risks for the charterer's account.

His testimony, however, is extremely unsatisfactory. He first intimated that he had inserted the insurance clause in this particular charter-party, as a special provision (p. 41); but, after being shown the printed forms of all the other leading ship brokers in New York, he finally admitted that no change had been made in it, in adapting it into the form used by his firm (p. 62), which was shown by his partner, Hall, to have been drawn up, and in use, before Bennett joined the firm (pp. 78, 39). When asked by his counsel what was included in insurance "on the vessel," Bennet said: "Insurance *on the vessel* against stranding, collisions, &c., as usual" (p. 41); but even here he does not intimate that it would include damage done *to another* vessel. He further says that he told a *former* owner of the *Barnstable* at the execution of the charter-party that "he would have to insure for his vessel *the same as the charter-party stated*" (p. 42). The same thing was repeated later in his testimony (x-Q. 64, p. 44), with a little more elaboration, but still without any suggestion that the owner would need to insure against damages done to *another* vessel. He first pretended that he had had experience in settling losses under these policies (p. 45), but they seem to have been cases where the vessel *insured* had been damaged, and he finally admitted that the question had never come before him, as a practical matter; until this case arose (x-Qs. 86, 87: pp. 46, 47).

Mr. Hall, who for many years, and until after this accident, was Bennett's partner, and had been a partner in the firm before Bennett joined it, also testified that the adjustment of liabilities between owners and charterers on net forms, such as this, had never come up for practical determination before

the firm of Hurlbut & Co., during the time that he was with it (p. 78).

It is submitted that Bennett's evidence is wholly insufficient to show such a practical construction of this clause, "by merchants and underwriters, and by the general consent of the mercantile world" as would be required to give it a more extended construction than that which was put upon it in *Ins. Co.* v. *Sherwood* (*supra*), and to have it include an obligation by the owner to insure against running-down losses for the charterer's benefit.

But there is other evidence, on the same subject, showing that Bennett's opinion of the meaning of the clause is entirely individual, and is not supported by any usage or opinion of the general mercantile world.

Hall, a witness of twenty-five years' experience, testified (p. 78):

"Q. 16. Referring to clause 22, that the owners shall pay for the insurance on the vessel, has that clause any commercial or trade significance in any way from the ordinary meaning of the words? A. No.

Q. 18. Is there any commercial or trade understanding that the charter is to have any benefit of such insurance? A. None at all."

Herbert Barber, a witness of thirty-five years' experience, testified (p. 84):

"Q. 14. Is there any trade meaning or interpretation of that clause differing in any way from the ordinary meaning of the words? A. Not that I am aware of.

Q. 16. In the form in which you have it [the insurance clause], does the charterer by any common usage get any benefit of the owner's insurance? A. No, I don't think so. No.

Q. 20. And so far as your experience goes, there is no trade meaning or interpretation of the ordinary clause that the owner shall pay for the insurance of

the vessel differing in any way from the plain meaning of the words? A. Not that I am aware of."

Ramon G. Cadiz, a witness of twenty years' experience, testified (p. 76):

"Q. 15. Is there any customary or trade meaning to those words, 'the owner shall pay for the insurance on the vessel,' which differs in any way from the ordinary meaning of the words? A. None whatever. Just the literal sense in which the expression is made use of there."

On cross-examination Mr. Cadiz and Mr. Barber appeared to think that if the owner insured he should assume the risk of collisions (pp. 76, 85); but neither had ever known of an actual case where the point was involved or had come up for practical determination (pp. 77, 85).

Mr. Hall's evidence has already been referred to.

The evidence of Mr. Gourlie, to which the District Judge alluded, was far from showing any definite trade meaning of the phrase, differing from its adjudged legal meaning. The material part of his testimony on the subject is short, and may for convenience be quoted (p. 70):

x-Q. 21. So that when you speak of a policy of insurance on a vessel you would understand that to cover at least three-quarters of the running down? A. Well, no, answering that question, I don't think that I would. * * *

x-Q. 26. Where a charter-party provides that the owner shall pay the insurance on the vessel, would not that, in your opinion, include all insurance? A. No.

Page 71: x-Q. 30. Where the c .arter provides that the owner shall pay for the insurance on a vessel, would not that, in your opinion, include all insurance? A. No.

x-Q. 31. What would not be included? A. I do

not think that the four-quarters collision would be included in it.

x-Q. 32. That is, under that clause in the charter-party, in your opinion, the shipowner would insure against the loss of the vessel, and the charterer would insure against her running down? A. No; I didn't mean that, either.

x-Q. 33. Will you explain, then? A. Under that clause I should not expect that the owner of the vessel would insure against everything. For instance, I should not expect to find that he would insure against more than three quarters collision.

x-Q. 34. You would expect him to insure to the extent of three-quarters? A. Yes; that is my *feeling* on the subject.

Page 74: x-Q. 53. In the case of an English vessel, if I understand you, taking out insurance, you would expect that insurance to cover three-quarters of the running down? A. I would, if I was told that they were seeking full insurance.

x-Q. 54. Full insurance would imply, of course, insurance against running down as well as insurance against other loss? A. Full insurance would imply insuring three-quarters running down as well as other loss.

x-Q. 55. Simple insurance would imply that? A. No. *It would prompt an inquiry*, I think. If you ask me to procure insurance on your hull, and you told me the amount and her name, and her tonnage, and her voyages, and her valuation and all that, *I would have to ask you the question, 'Do you want the running down included?'*"

On this state of the evidence it cannot be said that the contract has received "a practical construction by merchants and underwriters, not through any partial or local usages, but by the general consent of the mercantile world," under which the phrase "insurance on the vessel" can be said to include anything more than it was held to include in the case of the *Insurance Company* v. *Sherwood*,

namely, insurance against damage to the *Barnstable* herself.

3. Insurance against running-down risks is not properly described as an insurance "on the vessel."

It is generally a "rider," though sometimes a separate policy, but in either case, is not included in the hull policy, and is not to be an insurance "on the vessel" (1 *Arnould, Mar. Ins.*, 3d Ed., 20, 21; 2 *do.*, 672, 673). Mr. Gourlie gave the substance of the form of the clause in his evidence (p. 72).

It is set out in full in *McArthur on Marine Insurance* (2d Ed.), p. 372, as follows:

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion of *three-fourths* of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured; and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred, or paid; *provided* also, that *this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury* to individuals for any cause whatsoever."

See also numerous forms of the clause in McArthur, Appendix III. (pp. 372-378); 1 *Arnould*, pp. 238, 239.

This is no more properly to be described as an "insurance on the vessel" than would be an employer's liability policy, taken out against liability

for personal injuries to those on board the vessel, which it is seen, is always expressly excluded from the indemnity provided by the running-down clause.

The Court should not have been astute to find a meaning in the insurance clause which would oblige the owner to insure against the misconduct or neglect in navigation of the servants of the charterer (*General Ins. Co.* v. *Sherwood*, 14 How., 351, 367–368).

It was open to the charterer to insure against such risks. If it has not done so, it will be assumed that it intended to bear them, unless it can point to some clear provision in the charter, by which the risks were devolved on the owner. The burden of proof to show a devolution of the risk must rest with the charterer. A finding that the risk had been shifted should not be made except on very clear proof. The law regards with disfavor a stipulation that one party shall insure against another's misconduct and give to that other the benefit of the insurance (The *Hadji*, 22 Blatchf., 235, 238).

4. The evidence did not warrant the conclusion reached by the Court below, that the charterer was entitled to the benefit of the shipowner's insurance in any amount.

a. The shipowner's insurance was taken out for his own protection only. It is to be borne in mind that both the shipowner and the charterer had insurable interests. The shipowner had his own investment at stake, which was liable to be lost by perils for which neither party to the contract would be liable, *e. g.*, perils of the sea. He might also wish to insure the solvency of the charterer, in case the latter, by its faults, imposed liens on the ship which it could not discharge. Because the law attaches a primary liability to the ship for a collision loss to another ship, the owner also had an insurable interest in that risk, which

would not be affected by the fact that the charterer also had an insurable interest in it. The owner's insurable interest in such risk would not be taken away by the fact that he had a right of indemnity against the charterer; for a charterer might prove to be insolvent (1 *Arnould Mar. Ins.*, 3d Ed., 53). The subrogation of underwriters must also be considered.

The mere fact, therefore, that the Turret Steamshipping Company "carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured," as is stated in the stipulation (subject to the objections reserved, and which were renewed and pressed in both courts below), does not tend in any way to establish a practical construction of clause 22 by the parties to the effect alleged by the charterer. It does not necessarily imply anything more than that the owner intended to protect his own interests.

Much less does it tend to show a mutual intention that the charterer should have the benefit of the owner's insurance. The Court, nevertheless, went to the length of holding that the charterer should have the benefit of all the shipowner's insurance, and further penalized it in the sum for which it was uninsured under marine policies, and also for the personal injury risks which were not insurable under a marine policy, even with a running-down clause attached (*Gourlie*, p. 72, Q. 40), but could only be insured under an accident policy.

The District Judge seems to have regarded the shipowner and the charterer as engaged in a joint enterprise, and to have considered that the owner's insurance was for joint account. For example (p. 95), he says: "The phrase seems broad enough to include insurance of every kind that in the expectation of the parties properly appertained to their *joint enterprise*" (p. 94). "In reply to this criticism, it may be said that the owner's argument involves the fallacy of a shifting of premises and of treating the

insurance, first, as relating to the vessel and *to the joint enterprise of owner and charterer*," &c.

The District Judge certainly misconstrued the petitioner's argument and brief, if he understood that it was ever suggested that the parties were engaged in a joint enterprise. It was not so stated in the brief.

In point of fact there was nothing *joint* about the enterprise, any more than there would be a joint enterprise between landlord and tenant, under a lease which provided that the landlord should pay certain expenses in respect of the premises, and the tenant should pay others.

The enterprise of the shipower was limited strictly to furnishing the ship, and keeping it in order for use, in order to earn the rent for its service. It was of no interest to him whether the charterer actually made any use of the vessel by carrying cargoes or not. The use of the vessel in its business of importing fruit was the enterprise of the charterer exclusively.

The assumption that the parties were engaged in a joint enterprise really lies at the base of much of the Judge's opinion. For example, he argues that because the charter party specified certain charges to be borne by the charterer, and certain by the shipowner, that " it must follow that both should share in all benefits accruing from the payment of fixed charges upon the vessel " (p. 95).

Surely this cannot be law. If it is, then the shipowner ought to share in the profits which accrued from the importation of the charterer's fruit. The shipowner obtained no benefit from the mere navigation of the ship, as the hire was payable whether the ship was navigated or not. It therefore gained no direct benefit from the payment by the charterer of the charges it assumed, all which were incidental to the use of the ship as an instrument of commerce, unless it is still entitled under the mutual benefit theory to some of the fruit profits.

b. It is next to impossible, and not at all reasonable, to spell out of the words used, a mutual intention that the charterer should have the benefit of the insurance obtained and paid for by the owner. There is nothing in the charter-party which necessarily implies it.

In another relation (Clause 23) the charterer *did* stipulate for a benefit, expressly; and under an implication which arises from the concluding sentence of clause 17, it appears to have been understood that each party would insure its own risks, irrespective of insurance by the other.

The evidence of the witnesses is conclusive to the effect that there is no custom under which the charterer should have the benefit of the owner's insurance.

Hall testified:

(P. 78, Q. 18.) Is there any commercial or trade understanding that the charterer is to have any benefit of such insurance? A. None at all.

(P. 79.) Q. 26. Is there a well known clause in charter-parties to meet the case of an owner insuring for the benefit of a charterer if the charterer desires or requires it? A. I have seen such clauses.

Q. 32. Have you chartered any vessels on different forms in which the insurance clause was different. I mean to ask you about the Pirate and the Kenilworth? A. Those are the only two boats that I remember.

Q. 33. How about the insurance clause there, if you remember? A. The printing of it?

Q. 34. No, the way it was. A. If I remember rightly, it specially stipulated that the boats were to be kept insured, and that any damage done to the vessel over one hundred and twenty pounds, which was not covered by the policy; but any damage over one hundred and twenty pounds recovered under the insurance policy, the charterers were to have the benefit of the insurance.

Q. 35. And how about the one hundred and twenty pounds? A. If the damage did not amount to that, then the charterers had to pay for the damage."

The witness further testified (Q. 40) that he was acquainted with the firm of Frank C. Strick & Company, of London, Swansea, Cardiff and Newport, England, and had seen clauses similar to that embodied in their form (*Petitioner's Charter, Exhibit* 15). That clause is quoted in the opinion of the Court (p. 93) and reads:

"The owners * * * shall pay for insurance on the vessel *against all risks*, including protection and indemnity, and freight and demurrage club protection, *giving charterers full benefit of the same*, as if they were for the time being owners of the ship."

Herbert Barber (p. 84, Q. 16) testified:

"In the form in which you have it (clause in his form of charter was in the same words as the clause here in question), does the charterer, by any common usage, get any benefit of the owner's insurance? A. No, I don't think so.

"Q. 17. Now, if the charterer desires the benefit of the owner's insurance, is there a provision for that made? A. In some charters it is made.

(P. 85.) "x-Q. 21. That is, if I understand you, Mr. Barber, where the owner agrees to pay for the insurance he has the benefit of the insurance? A. That is so; yes.

"x Q. 22. And if the charterer is to have any interest in that insurance it must be so provided expressly? A. That is my understanding of it; yes."

Bennett testified (p. 48):

"I have never seen a charter pass through our office or any other office in which a charterer insured the vessel *or got any benefits from insuring*

the vessel whether made by the owners or anybody else.

"(P. 50.) x-Q 111. Have you ever seen, in your experience, a charter-party in which these words occurred: 'Charterers to have the benefit of the insurance?' A. I never have. As a rule, the owners are given no benefit.

"x-Q. 112. Have you ever seen a charter in which there were any words similar to those? A. Not to my knowledge, in which the charterer has got any benefit at all from the insurance."

Notwithstanding this evidence, the District Judge seems to have found, that Clause 22 of this charter-party, which provides "that the owner shall pay for the insurance on the vessel," was as broad, included the same subjects, and gave the charterer the same benefits as the clause in Strick & Company's charter above quoted (p. 96).

This finding seems, on the difference of language used in the two clauses, to be clearly incorrect. An insurance "on the vessel," is not the same thing as an insurance on the vessel against "*all risks* including protection and indemnity and freight and demurrage club protection."

"Protection and Indemnity, Freight and Demurrage Club risks," are not insurance, in any proper sense (1 *Arnould Mar. Ins.*, 3d Ed., 139; *Harvey* v. *Beckwith*, 12 W. R., 819, 896).

In the *Titania*, 19 Fed., 101, where the bill of lading provided that the shipowner should "not be liable for any damage to goods capable of being covered by insurance," it was held (p. 104) that the clause "cannot reasonably be construed as intended to mean any possible insurance and upon any possible insurance. It must be held to refer only to insurance which might be obtained in the usual course of business from the ordinary insurance companies." It was held not to have reference to Protection Club indemnities.

There is absolutely nothing in clause 22 that is equivalent to the express provision in Strick's

charter, which gives "charterer's full benefit of same, [insurance], as if they were for the time being owners of the ship."

It is too great a stretch on language to hold that the two clauses are equivalent. One would cut off the right of subrogation, while the other would not.

The Court should have found that neither the words of the clause in this charter party, nor the evidence in the case, implied that the Fruit Company should have the benefit of the owner's insurance.

If such a result was desired, the charterer should have inserted the clause, which is commonly adopted to achieve it, and which it *did* use in clause 23. Common carriers often stipulate that, in case of claims for damage, they shall have the benefit of the shipper's insurance on goods; but in such cases the intention is made clear, as, for example: "The carriers [if] liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods" (*Phœnix Ins. Co.* v. *Erie, &c.*, 117 U. S., 312; The *Hadji*, 20 Fed., 875; 22 Blatch., 235; *Rintoul* v. *N. Y. Central Ry.*, 21 Blatchf., 439; the *Sidney*, 23 Fed., 88). In the absence of such a clause here, it must be inferred that there was no common intention that the charterer should have the benefit of the owner's insurance to cover the consequences of the charterer's neglect.

VI.

If the insurance clause is susceptible of a construction that required the owner to insure against damage which the Barnstable might do to another vessel, owing to the charterer's faults, and to give the charterer the benefit of

such insurance, the obligation would extend only to the usual three-quarters of the running-down risk. The Court erred in refusing to hold that the remaining quarter would have to be borne by the charterer.

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The import of clause 22, if extended by reference to custom and usage, must also be confined by the limitations of the usage.

If Mr. Gourlie's evidence amounts to proof of a custom for shipowners to insure "on the vessel" a certain amount on the running-down risk, it is very clear to the effect that the usage is not to insure more than three-quarters on that head (pp. 70-75).

Lloyd's form of rider, to cover this risk, has, in the print, the words "three-quarters" (*Gourlie*, p. 73; *McArthur Mar. Ins.*, 2d Ed., 325; 1 *Arnould, Mar. Ins.*, 3d Ed., 238, 239), and in every one of a large number of such clauses, collected in *McArthur's Mar. Ins*, App. III. (pp. 372-378), the words "three-fourths" appear.

The risk of the fourth fourth is commonly protected, if at all, in Mutual Protecting Clubs, in which the owner is in part his own indemnitor (*McArthur*, p. 325; cf. *London S. S. Owners Mutual Assn.* v. *Grampian Co.*, 24 Q. B. D., 32; 1 *Arnould*, 139).

This is not a form of "insurance on the vessel." Such clubs do not even issue a policy (1 *Arnould*, 139).

Gow, Marine Insurance, ends his discussion of the running down clause, as follows (p. 253):

"The running down clause discussed above deals with *only three-quarters* of the shipowner's liabilities; *in a few cases*, underwriters have consented to extend the provisions of the clause to cover the whole of the assured's liabilities arising out of damage done to property by the collision of the insured ship with another ship or vessel. The clause thus

extended is known as the 'four-fourths' running down clause." But, even as thus extended, it would still remain with the proviso "That this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay * * * for loss of life or personal injury" (*Gow*, p. 252).

No part of this runnning risk would be covered by the insurance clause as construed in *Genl. Ins. Co.* v. *Sherwood*, 14 How., 351. If any part of it should have been covered, "on the vessel," for the charterer's benefit, under some established usage, it is plain that the usage would not imply an insurance of more than three-fourths of the collision risk (*Gourlie*, pp. 70-75). Resort to usage, therefore, would leave the charterer to bear one-fourth of the collision damages, or $3,643 (p. 36); and for the error of the Court below in failing to charge it with that amount, because of its fault, the decree should be reversed.

VII.

The Court below erred in holding, that, under the most extended construction of which clause 22 is capable, the owner was bound to insure the charterer against claims for personal injuries to persons on board another vessel, or for the death of such persons, caused by the faults of the charterer in navigating the insured vessel.

These classes of risks are not insurable under any known form of marine policy on a vessel (1 *Arnould, Mar. Ins.*, 3d Ed., pp. 20, 21; 2 *do.*, p. 673). Plainly they are not insurable under the Lloyds' form of collision clause (*Gourlie*, pp. 69, 72), or under any of the forms that are quoted in the books on marine insurance (*McArthur, Marine Ins.*, 2d Ed., pp. 325,

372); 1 *Arnould on Ins.*, p. 238). The charterer has not produced to the Court any form of policy under which these classes of losses could have been covered. Surely it cannot be inferred that the parties intended that the owner was to insure these risks under some form of accident policy; for such a policy would not be an "insurance on the vessel" in the sense of the charter-party. Yet apparently they would have to be insured in that way, if at all.

The damages on these classes of claims amount, without interest, to $4,900 (p. 36). Clear error was committed by the Court below in failing to hold that these damages, at least, should be charged to the charterer; and for this error alone, if for no other reason, its decree should be reversed.

Last Point.

The decree appealed from should be reversed, with costs, and the cause remanded, with instructions to enter a decree adjudging that the Boston Fruit Company pay all the damages due to the libelants and intervenors, and that the Turret Steam Shipping Company have judgment against the Boston Fruit Company for any sum that it may be compelled to pay under decrees in rem against the Barnstable.

March 6, 1901.

Respectfully submitted,
CONVERS & KIRLIN,
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